

1 ACT, THAT THEY FORMED AN AGREEMENT TO THE DETRIMENT  
2 -- TO ACCOMPLISH WRONGFUL MEANS TO THE DETRIMENT OF  
3 THE CLASS.

4 AND WE WOULD SUBMIT TO THE COURT THAT THE  
5 CASE LAW, AND I HAVE CITED A COUPLE OF CASES, AND I  
6 THINK THERE ARE OTHERS THAT I COULD SUBMIT, IF  
7 GIVEN THE OPPORTUNITY, THAT SUGGEST THAT WHEN TWO  
8 PARTIES ARE IN PARI DELICTO IN SUCH A WAY THAT  
9 ALLOWING ONE TO INDEMNIFY THE OTHER IS CONTRARY TO  
10 PUBLIC POLICY.

11 AND WE HAVE ASKED THE COURT IF -- WE  
12 BELIEVE THAT THAT ISSUE NEEDS TO BE SERIOUSLY  
13 EXPLORED BY THIS COURT BEFORE EVEN PRELIMINARY  
14 CERTIFICATION IS PERMITTED BECAUSE WE DON'T EVEN  
15 THINK THAT THIS IS WITHIN THE RANGE OF PERMISSIBLE  
16 SETTLEMENTS FOR FACEBOOK TO SETTLE THIS CASE ON  
17 BLOCKBUSTER'S BEHALF.

18 BLOCKBUSTER -- ESPECIALLY WHEN NO  
19 INJUNCTIVE RELIEF IS PROVIDED. BLOCKBUSTER, YOU  
20 KNOW, THEY DON'T EVEN PUT TOGETHER SOME PROGRAM OF  
21 A COMPLIANCE OFFICER.

22 THE COURT: WELL, AND THE PROPOSED  
23 SETTLEMENT, THEY'RE STOPPING THE DEFENDANT PROGRAM.

24 MR. WILSON: BASICALLY THEY'RE STOPPING  
25 THE BEACON PROGRAM. WE HAVE NO COMMITMENT THAT

1 BLOCKBUSTER IS GOING TO TAKE FURTHER STEPS TO BE  
2 MORE CAREFUL.

3 THE COURT: WELL, YOU CAN SUE THEM. YOU  
4 CAN SUE THEM. YOU CAN BRING A NEW CASE. I MEAN,  
5 THIS CASE, IF I WERE TO APPROVE THE PROPOSED  
6 DISPOSITION HERE, THAT DOESN'T GIVE A, YOU KNOW,  
7 GET OUT OF JAIL FREE CARD TO BLOCKBUSTER FOR ALL  
8 TIME FOR EVERYTHING IT DOES.

9 THIS IS FOCUSSED, AS I UNDERSTAND IT, ON  
10 THIS BEACON PROGRAM, IF YOU WILL, AND THAT'S THE  
11 PROGRAM.

12 IF BLOCKBUSTER ENGAGES IN CONDUCT,  
13 DIFFERENT CONDUCT, I MEAN, GO FOR IT. GO AT THEM.

14 I MEAN, WHAT YOU'RE SUGGESTING SOMEHOW  
15 THAT SHOULD THIS SETTLEMENT, THIS PROPOSED  
16 DISPOSITION BE GRANTED AND AT THE END OF THE DAY,  
17 THIS IS GIVING CARTE BLANCHE TO BLOCKBUSTER TO DO  
18 ANYTHING IT WANTS TO DO AND I CERTAINLY, WERE I TO  
19 APPROVE IT, I WOULDN'T THINK IT GOES THAT FAR.

20 MR. WILSON: YOUR HONOR, IT CERTAINLY  
21 LET'S THEM OFF THE HOOK FOR A SYSTEMIC VIOLATION OF  
22 ALL OF THE VERY SIGNIFICANT PORTION OF THE USERS.

23 THE COURT: I UNDERSTAND THAT ARGUMENT,  
24 BUT THAT IDEA THAT YOU SAY THAT THERE WOULDN'T EVEN  
25 BE INJUNCTIVE RELIEF, IT WOULD BE THE PARTICULAR

1 PROGRAM THAT IS THE SUBJECT OF THE PROCEEDINGS IN  
2 THIS COURT, AS I UNDERSTAND IT, UNLESS THIS IS  
3 WRONG, THAT EVERYONE SEEMS TO SUGGEST THAT THAT  
4 PROGRAM IS NO MORE.

5 NOW, YOU KNOW, YOU DON'T NEED INJUNCTIVE  
6 RELIEF IF THE PROGRAM HAS BEEN TERMINATED.

7 OKAY. LET ME HEAR EITHER FROM WHOEVER  
8 WANTS TO GET UP FACEBOOK COUNSEL OR PLAINTIFF'S  
9 COUNSEL.

10 MR. RHODES: GOOD MORNING, YOUR HONOR.  
11 MIKE RHODES ON BEHALF FACEBOOK. LET'S GO BACK TO  
12 FIRST PRINCIPLES, THE QUESTION OF INTERVENTION,  
13 PERMISSIVE OR MANDATORY.

14 A FUNDAMENTAL ARGUMENT INHERENT IN THE  
15 TIMELINESS FACTOR IS WHETHER OR NOT THE FAILURE TO  
16 ACT HAS RESULTED IN PREJUDICE TO THE PARTIES.

17 ATTACHED TO A DECLARATION SUBMITTED BY  
18 BLOCKBUSTER DOCUMENT -- THIS IS DOCKET RECORD 54-1,  
19 PAGE 4 --

20 THE COURT: RIGHT.

21 MR. RHODES: -- IS AN E-MAIL TO THE  
22 COUNSEL THAT JUST ADDRESSED YOUR HONOR. LOOKED YOU  
23 RIGHT IN THE EYE AND GAVE YOU THE ARGUMENT.

24 THE COURT: I SEE IT.

25 MR. RHODES: THIS IS AN E-MAIL FROM HIM

1 TO BLOCKBUSTER IN MAY IN WHICH HE EXPRESSLY  
2 ACKNOWLEDGES THE EXISTENCE OF THE LANE CASE AND THE  
3 FACT THAT IT HAS ENTERED INTO FINAL SETTLEMENT  
4 NEGOTIATIONS.

5 NOW, I CAN TELL YOU WITH GREAT CERTITUDE  
6 THAT AFTER THIS DATE SETTLEMENT NEGOTIATIONS  
7 CONTINUED. WE CONDUCTED ANOTHER FULL DAY WITH  
8 MR. PIAZZA, I KNOW YOU'RE FAMILIAR WITH HIS FREE  
9 SCHEDULE, IN LATE JULY.

10 THE COURT: YES.

11 MR. RHODES: SO HE HAD ESSENTIALLY ALL OF  
12 MAY, JUNE, AND JULY TO COME FORWARD AND FILE A  
13 NOTICE OF RELATED CASE AND JUMP INTO THESE  
14 PROCEEDINGS BEFORE MR. KAMBER AND I HAD SPENT  
15 COUNTLESS HOURS, ANOTHER FULL DAY OF MEDIATION AND  
16 TO TRY AND FIND THE SETTLEMENT IN THE MIX HERE.

17 THAT'S REAL AND TANGIBLE PREJUDICE TO MY  
18 CLIENT, FACEBOOK, BECAUSE HE FAILED TO ACT.

19 AND I THINK, TO BE HONEST WITH YOU, IF  
20 YOU LOOK AT THE INSINUATIONS IN HIS PAPERS AGAINST  
21 ME PERSONALLY, AGAINST THE PROCESS, AGAINST  
22 BLOCKBUSTER, I CAN LOOK YOU RIGHT IN THE EYE AND  
23 SAY THAT "I HANDLED THESE NEGOTIATIONS PERSONALLY.  
24 THERE WAS NOBODY ELSE. MIKE RHODES ALONE."

25 THE COURT: YOU'RE NOT SUGGESTING,

1       THOUGH, THAT SHOULD THE SETTLEMENT BE APPROVED AT  
2       THE END OF THE DAY, IT'S NOT GOING TO HAVE THE  
3       IMPACT? AT LEAST IT ARGUABLY COULD HAVE THE IMPACT  
4       OF BEING OF GREAT BENEFIT TO BLOCKBUSTER; RIGHT?

5               MR. RHODES: IN THIS INSTANCE RELATING TO  
6       BEACON?

7               THE COURT: YES.

8               MR. RHODES: BECAUSE AS YOU CORRECTLY  
9       ANTICIPATED, THERE WERE 47 BEACON MERCHANTS. PUT  
10      YOURSELVES IN THE POSITION OF FACEBOOK.

11              YOU'RE GOING TO HAVE 47 OTHER CASES TO GO  
12      FORWARD AND THEN HAVE THEM DEMAND I PAY THEIR  
13      DEFENSE COSTS AND IF THEY LOSE MAYBE PAY THE  
14      JUDGMENTS?

15              THE COURT: LET ME ASK YOU IF THE TIME  
16      ISSUE WASN'T ONE OF THE ARGUMENTS THAT YOU WERE  
17      MAKING.

18              LET'S SAY THAT COUNSEL IN THE HARRIS CASE  
19      ACTED WITH GREAT DISPATCH AND THEN CAME IN AND SAID  
20      WE HAVE THE RIGHT TO INTERVENE. WOULD YOU SAY THAT  
21      THEY DIDN'T HAVE A RIGHT TO INTERVENE AT THAT  
22      STAGE?

23              MR. RHODES: YES.

24              THE COURT: OKAY. WHY NOT?

25              MR. RHODES: I'LL USE THE TEXAS IDIUM.

1 IT'S THE TALE WAGGING THE DOG. THIS IS A MUCH  
2 LARGER CASE. THIS IS THE CASE AGAINST FACEBOOK AND  
3 SEVEN CAUSES OF ACTION AND SEVEN NAMED DEFENDANTS  
4 AND DOE ALLEGATIONS, AND THIS IS AN EXTRA RECORD  
5 STATEMENT THAT I'M ABOUT TO MAKE YOU SO YOU MAY NOT  
6 CONSIDER IT BUT THE REALITY IS WE WERE CONSIDERING  
7 AMENDMENTS TO BRING THE REST OF THE BEACON  
8 MERCHANTS IN.

9 THEIR CASE IN TEXAS IS SOLELY AGAINST  
10 BLOCKBUSTER, A SOLITARY CLAIM FOR VPPA.

11 IF YOU GO BACK TO THE BEGINNING OF THE  
12 RECORD IN THIS CASE, WE FILED A MOTION TO DISMISS  
13 AND IN OUR MOTION TO DISMISS PAGES 9 THROUGH 12, WE  
14 EXPLAINED WHY FACEBOOK IS NOT LIABLE TO VPPA.  
15 WE'RE NOT A VIDEOTAPE SERVICE PROVIDER, AND IT  
16 DOESN'T APPLY TO US.

17 SO HE HAS A SMALL CASE.

18 YOU CAN QUARREL WITH ME I SUPPOSE ABOUT  
19 WHETHER WE SHOULD HAVE FILED A NOTICE OF RELATED  
20 CASE. FROM MY ADVANTAGE REPRESENTING FACEBOOK ON A  
21 BEACON PROGRAM, I DIDN'T THINK THAT CASE WAS  
22 RELATED. MORE FUNDAMENTALLY IT'S STAYED. IT'S UP  
23 ON APPEAL.

24 THE COURT: ALTHOUGH FOR FUTURE REFERENCE  
25 I DO THINK IF YOU LOOK AT 3-13, THE FOCUS OF THE

1 CASE -- THE CASE YOU'RE LOOKING AT FOR PURPOSES OF  
2 DETERMINING WHETHER OR NOT IT'S RELATED IS THE  
3 TEXAS CASE.

4 MR. RHODES: I HEAR YOU. I ACKNOWLEDGE  
5 THAT, YOUR HONOR.

6 THE COURT: OKAY.

7 MR. RHODES: BUT I STILL SAY THAT ON THE  
8 MERITS, ASIDE FROM TIMELINESS WHICH I THINK IN THE  
9 LAW OF INTERVENTION IS A VERY SIGNIFICANT FACTOR  
10 BECAUSE OF ITS POTENTIAL TO WORK PREJUDICE TO  
11 PARTIES LIKE FACEBOOK WHO WITH HIS KNOWLEDGE, FOR  
12 90 MORE DAYS HE SITS THERE AND DOES NOTHING, WE  
13 TAKE FURTHER ACTIONS AT A REAL COST.

14 YOU KNOW, WE'RE NOT TALKING -- WE'RE  
15 TAKING TENS OF THOUSANDS OF DOLLARS, MANY HOURS TO  
16 REWORK THE DEAL. THE END PRODUCT, WHICH AS YOU  
17 NOTED BEACON IS BEING KILLED. THAT'S MORE THAN  
18 INJUNCTIVE RELIEF.

19 WE SPENT MONTHS ON TRYING TO FIGURE OUT  
20 HOW TO TWEAK IT AND AT THE END WE SHOT IT AND TO ME  
21 FUNDAMENTALLY HAVING TO LOOK AT THE QUESTION  
22 PRESENTED TODAY IN THIS CONTEXT. THEY HAVE NO  
23 RIGHT TO INTERVENE AND EVERY ARGUMENT THEY RAISED,  
24 AS YOU PROPERLY POINTED OUT, CAN BE IN THE FINAL  
25 APPROVAL HEARING.

1                   AND THE IDEA THAT I MAY NOT HAVE TIME TO  
2                   PREPARE FOR A HEARING THAT MAY NOT OCCUR UNTIL  
3                   FEBRUARY, GIVEN ALL OF THE BRIEFING HE HAS DONE  
4                   TODAY AND KNOWING IT'S GOING TO HAPPEN, THAT  
5                   DOESN'T GET HIM VERY FAR.

6                   THE COURT: THE POINT THAT MR. WILSON  
7                   MADE WAS SHOULD I GRANT PRELIMINARY APPROVAL AND  
8                   START THE TRAIN DOWN THE TRACKS, THAT SOMEHOW WHEN  
9                   YOU GET TO THE FAIRNESS HEARING THERE'S A  
10                  PRESUMPTION OF SOME KIND THAT -- WHAT IS YOUR VIEW  
11                  ON THAT?

12                  MR. RHODES: I WISH IT WERE SO. I WISH  
13                  IT WERE SO. I DO A LOT OF CLASS ACTIONS AND I WISH  
14                  IT WERE SO BECAUSE I CAN TELL YOU THAT I CERTAINLY  
15                  HIT A FEW SPEED BUMPS IN THE FINAL APPROVAL  
16                  HEARING.

17                  ONE FINAL POINT, AND THEN I'LL SIT DOWN.

18                  THE QUESTION OF WHETHER OR NOT THE REMEDY  
19                  OF OPTING IS EFFECTIVE FOR THIS SMALL GROUP OF  
20                  PLAINTIFFS IS INTERESTING. THESE GUYS HAVE BEEN UP  
21                  TO A LOT IN THE LAST WEEK. THEY SUED FACEBOOK ON  
22                  FRIDAY. THEY DIDN'T WANT TO COME HERE TO SEE WHAT  
23                  YOU WOULD DO. THEY SUED US IN TEXAS. THEY SERVED  
24                  IT TWO DAYS AGO OR YESTERDAY.

25                  IN THEIR PRAYER THEY SEEK ATTORNEY'S FEES



1 FOR A STATUTORY VIOLATION.

2 AND THE LAW IS PRETTY CLEAR THAT WHEN  
3 THERE'S AN ADEQUATE REMEDY OTHER THAN CLASS  
4 CERTIFICATION, THAT IS TO SAY THAT SOMEBODY CAN  
5 BRING AN INTEGRAL CLAIM AND SEEK TO RECOVER FEES  
6 AND COSTS, SOME COURTS WILL LOOK AT THAT AND SAY  
7 YOU DON'T NEED TO HAVE A CLASS. YOU HAVE EVERY  
8 INCENTIVE TO BRING AN INDIVIDUAL CLAIM BECAUSE EVEN  
9 IF YOUR INDIVIDUAL PENALTY IN THIS CASE WAS SMALL,  
10 THE ATTORNEY'S FEES AND COSTS WOULD BE FULLY  
11 COMPENSABLE. THAT'S WHAT THEY SAY IN THEIR  
12 COMPLAINT.

13 SO THE IDEA THAT IT'S NOT AN EFFECTIVE  
14 REMEDY TO THE INTERVENORS, NOT THE LAWYERS STANDING  
15 HERE, BUT THE PEOPLE THAT ARE ON THE CAPTION.

16 THE COURT: ALTHOUGH, DON'T YOU THINK  
17 THAT, AND THIS IS AGAIN, PERHAPS, JUMPING AHEAD TO  
18 THE QUESTION OF THE APPROVAL, BUT A \$2500 STATUTORY  
19 CLAIM ON AN INDIVIDUAL BASIS, HOW LIKELY IS IT?

20 I MEAN, THAT IS EXPECTING A LOT FOR A  
21 CLASS MEMBER TO -- A PUNITIVE CLASS MEMBER TO  
22 ACTUALLY PURSUE THAT?

23 MR. RHODES: I DON'T DISPUTE THAT IN  
24 PRACTICAL TERMS THAT MAY NOT OCCUR, BUT THAT'S NOT  
25 WHAT THE LAW SAYS.

1 THE LAW SAYS IF YOU CAN PROVIDE A REMEDY  
2 THAT OCCURS WHERE YOU CAN GET FEES AND COSTS, IT'S  
3 ONE OF THE FACTORS TO CONSIDER ON CLASS  
4 CERTIFICATION.

5 I'M NOT SUGGESTING THAT --

6 THE COURT: ALTHOUGH EFFECTIVELY I'M NOT  
7 SURE YOU CAN GET -- IF IT'S A \$2500 CLAIM, YOU HAVE  
8 TO GO TO A SMALL CLAIMS COURT IN TEXAS BUT MAYBE  
9 YOU CAN GET FEELS. I'M NO EXPERT ON TEXAS SMALL  
10 CLAIMS PROCEDURE BUT --

11 MR. RHODES: BUT THE POINT IS THAT THERE  
12 IS A RIGHTING OF REMEDY FOR THE INTERVENORS  
13 THEMSELVES AND I SUGGEST TO YOU, AND I DON'T MEAN  
14 TO BE CALLOUS, BUT I SUGGEST TO YOU THAT THE  
15 INTERVENORS, THE HUMAN BEINGS THAT ARE PURPORTING  
16 TO BRING THESE CLAIMS ARE NOT THE PEOPLE THAT ARE  
17 SITTING IN THE FRONT OF THE TRAIN.

18 THE COURT: WELL, BOTH SIDES, I KNOW  
19 YOU'RE SAYING, WELL, OH, THIS IS ABOUT FEES.

20 AND THE OTHER SIDE IS SAYING THAT THIS IS  
21 AN UNHOLY DEAL WHERE SKULDUGGERY HAS OCCURRED  
22 BETWEEN BLOCKBUSTER AND FACEBOOK.

23 I MEAN, A LOT OF THAT IS FORTUNATELY  
24 SOMETHING THAT I DON'T HAVE TO PLUMMET THE DEPTHS  
25 OF BECAUSE WHAT I NEED TO DETERMINE IS, IS THERE A

1       LEGAL BASIS TO INTERVENE OR NOT?

2                   AND THEN DEPENDING UPON THAT  
3       DETERMINATION LOOK AT THE PRELIMINARY APPROVAL  
4       MOTION.

5                   THAT'S WHAT I HAVE IN FRONT OF ME. SO A  
6       LOT OF THIS STUFF ABOUT ALL OF THESE ACCUSATIONS OF  
7       WHO IS DOING WHAT BLISSFULLY, I DON'T THINK I  
8       NECESSARILY HAVE TO DO.

9                   MR. RHODES: I AGREE WITH YOU, BUT I  
10      THINK THE RECORD IS CLEAR THAT THEY DID KNOW ABOUT  
11      THIS A LONG TIME AGO, AND THEY DID NOT ACT.

12                  THE COURT: AND THAT FACT IS AN  
13      APPROPRIATE ONE FOR ME TO FOCUS ON.

14                  MR. RHODES: THANK YOU, YOUR HONOR.

15                  THE COURT: LET ME ASK YOU WHILE YOU'RE  
16      STANDING UP HERE, AND I KNOW THIS IS MERGING TO  
17      SOME DEGREE THE PRELIMINARY APPROVAL QUESTION AND  
18      THIS INTERVENTION ISSUE, BUT WHAT IS FLOATING OUT  
19      HERE IS THIS IDEA THAT THERE IS A TYPICALITY  
20      PROBLEM, THAT THE VPPA CLAIMS OF THE BLOCKBUSTER  
21      PUNITIVE CLASS MEMBERS IN THE TEXAS PROCEEDING,  
22      BECAUSE THERE IS VALUE IN THOSE CLAIMS IN A WAY  
23      THAT PERHAPS THE OTHER PUNITIVE CLASS MEMBERS IN  
24      THE NON-BLOCKBUSTER WORLD, THEY MAY NOT HAVE THE  
25      STATUTORY 2500.

1 WHAT IS YOUR RESPONSE TO THAT?

2 MR. RHODES: LET ME RESPOND TO THAT ON  
3 THE MERITS. THEY ACT AS IF THEY HAD THE JURY TRIAL  
4 AND THEY HAVE WON.

5 THE COURT: WELL, I RECOGNIZE THAT YOUR  
6 POSITION IS THAT THERE IS NO VPPA CLAIM.

7 BLOCKBUSTER I HAVEN'T HEARD FROM.

8 MR. RHODES: WE'RE SAYING THAT IN THE  
9 CONTEXT OF A CASE LIKE THIS, AND THIS GOES TO THE  
10 FAIR ADMINISTRATION OF A LAWSUIT, A YEAR AGO WE  
11 FILED A MOTION TO DISMISS.

12 THE PARTIES MEET AND CONFER. WE GO OFF  
13 AND SPEND AN EXTRAORDINARY AMOUNT OF EFFORT TO  
14 SETTLE THIS CASE. IT'S NOT LIKE WE'RE TALKING  
15 ABOUT CHUMP CHANGE HERE. IT'S CLOSE TO TEN MILLION  
16 DOLLARS. THE COURT HAS DISCRETION ON SOME OF THESE  
17 PENALTY PROVISIONS.

18 SO THE PREMISE THAT, WELL, YOU SOLD US  
19 DOWN THE RIVER BECAUSE WE COULD GET A LOT MORE IF  
20 WE TRIED THE CASE, I CONCEDE THAT POINT. THAT'S  
21 THE NATURE OF A SETTLEMENT.

22 BUT IN THE CONTEXT OF A TEN MILLION  
23 DOLLAR DEAL, MULTIPLE MEDIATION SUPERVISED BY AN  
24 EXPERIENCED MEDIATOR AND CONDUCTED BY COUNSEL, THIS  
25 IS WHAT YOU END UP WITH IN THE SETTLEMENT ARENA.

1 THE COURT: I UNDERSTAND THAT, BUT IT'S  
2 NOT A QUESTION OF WHETHER OR NOT AT THE END OF THE  
3 DAY PLAINTIFFS CAN PREVAIL ON THEIR CLAIMS BECAUSE  
4 I ASSUME YOU WOULD AGREE WITH ME, THE TYPICALITY  
5 ANALYSIS IS JUST THE NATURE OF THE CLAIMS, NOT  
6 WHETHER OR NOT THEY'RE GOING TO WIN OR LOSE ON  
7 THOSE CLAIMS.

8 MR. RHODES: I AGREE WITH YOU.

9 THE COURT: SO THE QUESTION IS ARE THEY  
10 DIFFERENT IN KIND WHETHER OR NOT THEY'RE GOING TO  
11 SUCCEED?

12 AND THAT'S WHAT I'M TRYING TO GET AT  
13 BECAUSE THERE IS SOME SUGGESTION THAT THERE IS  
14 PERHAPS A SUBCLASS THAT HAS A FAIRLY DIFFERENT SET  
15 OF CLAIMS IN THE SENSE OF WHAT THEY COULD RECOVER  
16 THAN SOME OF THE OTHER PUNITIVE CLASS MEMBERS.

17 MR. RHODES: I DISAGREE FOR TWO REASONS.

18 ONE IS THAT THE CENTERPIECE OF LANE IS  
19 BEACON. BEACON IS FACEBOOK AND 47 MERCHANT  
20 DEFENDANTS. ACTIVITY TAKES PLACE ON THOSE WEB  
21 SITES AND IS FED BACK.

22 SOME WILL HAVE ALLEGED VPPA DISCLOSURE AS  
23 DOES FACEBOOK ON AIDING AND ABETTING AND SECONDARY  
24 LIABILITY THEORIES, AND SOME WILL NOT.

25 IS IT A SUBCLASS? I DON'T THINK SO.

1       THEY WANT TO RAISE THAT ARGUMENT TO COMMENCE YOU AT  
2       THE FINAL HEARING TO SAY THIS CLASS AS DENOMINATED  
3       SHOULD NOT BE CERTIFIED AS REQUESTED BECAUSE  
4       THERE'S THIS DISTINCT SUBCLASS.

5               BUT THAT'S NOT ON TODAY'S AGENDA, WITH  
6       ALL RESPECT. THIS IS A PRELIMINARY HEARING.

7               THIS IS SIMPLY I SEND A NOTICE AND TELL  
8       PEOPLE HOW TO OBJECT, WHEN TO OBJECT AND BRING ALL  
9       OF THESE ARGUMENTS FORWARD.

10              THE COURT: YES. THE PRELIMINARY  
11       APPROVAL, THOUGH, DOES REQUIRE ME TO LOOK AT THE  
12       BASIC RULE 23 FACTORS.

13              SO I AGREE WITH YOU, ALTHOUGH TYPICALITY,  
14       IF I HAVE TO LOOK AT TYPICALITY EVEN IN A  
15       PRELIMINARY BASIS, THESE ISSUES HAVE TO BE  
16       ADDRESSED IN SOME FASHION.

17              MR. RHODES: YES, AND I WOULD SUBMIT TO  
18       YOU IF YOU LOOK AT THE COMPLAINT IN THIS  
19       PROCEEDING, WHICH IS DOCUMENT 1 STARTING AT PAGE  
20       34, YOUR HONOR.

21              THE COURT: UH-HUH.

22              MR. RHODES: YOU'LL SEE THE DEFINITION OF  
23       A CLASS WHICH MORE THAN MEETS THE DEFINITION THAT  
24       YOU NEED TO SATISFY YOURSELF IS MET HERE IN ORDER  
25       TO PRELIMINARILY APPROVE THIS PROPOSED SETTLEMENT

1 CLASS.

2 THE COURT: OKAY. MR. KAMBER, DO YOU  
3 WANT TO SAY ANYTHING?

4 MR. KAMBER: I'LL BE BRIEF, YOUR HONOR.  
5 I JUST WANTED TO POINT OUT THAT FACEBOOK REALLY IS  
6 THE GRAVAMEN OF OUR CASE. AND WHEN ONE LOOKS AT --  
7 AND IT WAS INTERESTING AS MR. WILSON WHEN HE CAME  
8 UP HERE ONLY MENTIONED THE WORD BEACON IN THE LAST  
9 MINUTE OR TWO OF HIS PRESENTATION AND THAT WAS  
10 AFTER THE DISCUSSION WAS INITIATED BY THE COURT.

11 WHEN ONE LOOKS AT THE TRANSFER PAPERS  
12 THAT WENT ON DOWN IN FLORIDA, ONE NEEDS TO REMEMBER  
13 THAT THEY FILED IN THE EASTERN DISTRICT OF TEXAS  
14 WHICH HAD NO CONNECTION TO THIS.

15 AND WHEN THEY WENT TO THE NORTHERN  
16 DISTRICT OF TEXAS, THEY CONCEDED THAT WITNESSES AND  
17 FACTS AND WHAT WENT ON AND THE WRONG THAT WENT ON  
18 ALL EMANATED FROM THE NORTHERN DISTRICT OF  
19 CALIFORNIA. EVERYBODY IN THIS ROOM KNOWS THAT THIS  
20 CASE IS ALL ABOUT FACEBOOK BEACON.

21 THERE MAY BE THEORETICALLY A WAY TO GO  
22 AGAINST A COURSE OF ACTION AGAINST BLOCKBUSTER  
23 ONLY, AND WE AS PLAINTIFF'S COUNSEL WHEN WE WERE  
24 MAKING OUR DECISION THOUGHT THAT WAS IMPRACTICAL.  
25 THAT JUST DIDN'T MAKE ANY SENSE WHATSOEVER, AND IT

1 WAS NOT A WAY TO LITIGATE THE CASE.

2 IN LOOKING AT THE ARBITRATION CLAUSE  
3 FORESEEING ISSUES THAT THEY HAD, OBVIOUSLY BRINGING  
4 IN PARTIES THAT WERE NOT PART OF THE ARBITRATION TO  
5 US MADE SENSE.

6 I'M NOT GOING TO SIT HERE AND MAKE ANY  
7 CRITICISM OF THE ARBITRATION ARGUMENTS MADE BY  
8 TEXAS COUNSEL, AND IT DOESN'T HAVE ANYTHING TO DO  
9 WITH OUR CLASS AND THEIR CLASS, WHICH HAS  
10 OVERLAPPING MEMBERS OF TWO CLASSES, AND IT DOESN'T  
11 DO ANYBODY ANY GOOD.

12 AND I'M CERTAINLY NOT GOING TO COME UP  
13 HERE AND DO THAT.

14 AND, IN FACT, IT WAS INTERESTING THAT  
15 MR. WILSON MADE MENTION OF A CONVERSATION FROM A  
16 PUBLIC INTEREST GROUP. AND I BELIEVE THAT PUBLIC  
17 INTEREST GROUP WAS EPIC BECAUSE EPIC CALLED ME THE  
18 WEEK PRIOR AND ASKED ME IF WE BELIEVED THAT THIS  
19 CASE WOULD EXTINGUISH THE CASE IN TEXAS.

20 AND MY COMMENT TO EPIC WAS THAT I DIDN'T  
21 THINK IT WAS MY PLACE TO OPINE ON THAT. AND I SAID  
22 THAT IF THEY HAD AN INTEREST IN PURSUING -- IN  
23 PUTTING IN AN AMICAS BRIEF TO THE FIFTH CIRCUIT,  
24 THAT I DIDN'T WANT TO SAY ANYTHING THAT WOULD KEEP  
25 THEM FROM PUTTING IN AN AMICAS MANY BRIEF BECAUSE



1 OBVIOUSLY IN THE WORLD OF CLASS ACTION LITIGATION  
2 AND LOOKING AT THE INTEREST OF THE CLASS I CAN'T  
3 THINK OF WHERE IT BENEFITS THE CLASS ANYWHERE TO  
4 NOT PROCEED AND KNOCK OUT AN ARBITRATION CLAUSE AND  
5 CREATE ONE MORE STATE THAT ENFORCES AN ARBITRATION  
6 CLAUSE IN THIS CASE.

7 BUT HERE THAT WAS UNNECESSARY. IT WAS  
8 UNNECESSARY TO ENGAGE IN THAT LITIGATION IN ORDER  
9 TO RESULT IN THE BENEFIT OF THE CLASS.

10 AND WHAT I -- YOU KNOW, THERE WAS A  
11 PHRASE THAT WE LIKE TO USE. WE DO TECHNOLOGY  
12 LITIGATION. IT'S WHAT MYSELF AND MY FIRM DO MOST  
13 OF THE TIME.

14 AND THAT IS MY PHRASE IS THAT IT DOESN'T  
15 DO THE CLASS ANY GOOD TO SET UP AOL 2.0 AFTER AOL  
16 5.0 HAS BEEN RELEASED.

17 AND WHAT THIS ACCOMPLISHES THE SETTLEMENT  
18 AND NOT TO GO INTO TOO MUCH ON THE PRELIMINARY  
19 APPROVAL, BUT IT'S ALL ABOUT BEACON.

20 THE REASON WE HAD THE SECOND MEDIATION  
21 SESSION, THE REASON THIS THING DIDN'T GET RESOLVED,  
22 WE TRIED TO TINKER WITH THIS AND TRIED TO FIGURE  
23 OUT A WAY TO MAKE BEACON WORK.

24 AND THERE HAVE BEEN PUBLIC INTEREST  
25 GROUPS TRYING TO KILL OFF BEACON FOR YEARS. AND

1 THE REALITY IS THAT THIS SETTLEMENT HAPPENED  
2 BECAUSE THERE WAS A DISTINCTION MADE AT THE LAST  
3 MEDIATION, THAT THE ONLY WAY IT PROCEED IS BY  
4 KILLING OFF BEACON.

5 AND IT DOESN'T KILL OFF BEACON AFTER  
6 FINAL APPROVAL. IT KILLS OFF BEACONS WITHIN 60 OF  
7 THE PRELIMINARY APPROVAL.

8 SO I FEEL IT REALLY CONTRASTS WITH THE  
9 INTEREST OF THE CLASS FOR MR. WILSON TO COME HERE  
10 TODAY AND TO SAY THAT HE SHOULD BE HEARD NOW AND  
11 PRELIMINARY APPROVAL SHOULD BE STOPPED AND THAT  
12 THERE'S NO PREJUDICE BY HOLDING THIS UP WHEN IN  
13 REALITY 60 DAYS AFTER THIS COURT, IF IT WERE TO  
14 DECIDE TO AWARD PRELIMINARY APPROVAL, BEACON WOULD  
15 BE TERMINATED AND FUTURE HARMS WOULD BE ENDED AND I  
16 THINK THAT'S THE KIND OF INJUNCTIVE RELIEF THAT  
17 REALLY MATTERS.

18 AND PUTTING EVERYTHING ELSE ASIDE, THIS  
19 IS ABOUT THE CLASS. WHATEVER TAP DANCING MIGHT  
20 HAVE GONE ON IN TEXAS, I OBVIOUSLY WASN'T A PARTY  
21 THERE AND FOR ONCE AS PLAINTIFF'S COUNSEL IT'S NICE  
22 TO NOT BE IN THE CROSS AIRS OF ANOTHER PLAINTIFF'S  
23 COUNSEL COMING FORWARD.

24 BUT IN REALITY WHAT WAS SAID HERE BY  
25 MR. RHODES, IT IS CLEAR THERE IS PREJUDICE FROM ANY

1 DELAY. THAT TIMELINESS ISSUES WE INFORMED --

2 THE COURT: YOU DON'T DISPUTE, AND I'M  
3 NOT GOING TO ASK YOU TO OPINE ON WHAT WILL HAPPEN  
4 IN TO THE TEXAS PROCEEDING IF THE SETTLEMENT HERE  
5 IS ULTIMATELY APPROVED, BUT YOU DO -- IT IS YOUR  
6 POSITION, AS I UNDERSTAND IT, THAT THE EFFECT OF  
7 THE SETTLEMENT HERE, IF APPROVED, WOULD BE TO  
8 INSULATE BLOCKBUSTER FROM ANY CLAIMS EMANATING OUT  
9 OF THE BEACON PROGRAM; RIGHT?

10 MR. KAMBER: YES, IT WOULD RELEASE -- IT  
11 RELEASES ALL OF THE LIABILITIES STEMMING FROM  
12 BEACON.

13 NOW, THERE COULD BE THEORETICALLY, THERE  
14 COULD BE LIABILITY THAT ATTACHES FROM VPPA BECAUSE  
15 THAT'S NOT THE WAY THAT BLOCKBUSTER DOES THINGS  
16 BECAUSE OF THE WAY THEY RELEASE IT.

17 MR. WILSON MENTIONED INJUNCTIVE RELIEF.  
18 WELL, IF IT'S DEALING WITH THE BLOCKBUSTER PIECE,  
19 THAT'S REMEDIED HERE IN SPACE AND THERE'S NO  
20 PROBLEM WITH THAT.

21 IF THERE ARE OTHER ISSUES OF HOW  
22 BLOCKBUSTER DEALS WITH VPPA ISSUES, THIS CASE  
23 DOESN'T TOUCH THAT.

24 AND MR. WILSON THEORETICALLY STILL WILL  
25 HAVE HIS CASE, AND I'M NOT AN EXPERT ON HIS CASE IN

1 TEXAS, AND I WOULDN'T OPINE ON THAT, BUT I WILL SAY  
2 THAT IT IS OUR UNDERSTANDING THAT OUR RELEASE  
3 CERTAINLY RELEASES ALL LIABILITY THAT EMANATES FROM  
4 THE VPPA PROGRAM WITH BLOCKBUSTER AS THE GRAVAMEN  
5 OF THAT LIABILITY.

6 I WOULD JUST ALSO LIKE TO SAY ONE THING,  
7 IT WAS SAID THAT I -- IN A -- THE ONLY DISCUSSION  
8 THAT WE HAD WHICH WAS CHARACTERIZED LATER ON BY  
9 MR. WILSON IN HIS DECLARATION AS A MEET AND CONFER,  
10 THERE WAS THE POINT THAT WAS MADE HERE EARLIER  
11 TODAY IS THAT WE HAD IDENTIFIED THAT THERE WAS A --  
12 THAT THERE WAS AN INDEMNIFICATION AGREEMENT.

13 I WILL SAY TO THE COURT THERE WAS NO  
14 DISCUSSION, THERE WAS NO COMMENT, OR I NEVER OPINED  
15 ON ANYTHING THAT WOULD BE A CONFIDENTIAL DOCUMENT  
16 OR ANYTHING ELSE.

17 WHAT I ASKED MR. WILSON AS I SAID AFTER A  
18 YEAR OF LITIGATION WITH BLOCKBUSTER, DO YOU EVEN  
19 KNOW WHETHER THEY'RE BEING INDEMNIFIED BY FACEBOOK?

20 THE COURT: BECAUSE WE'RE GOING BACK TO  
21 THIS, THIS DISCUSSION BETWEEN COUNSEL THAT, AGAIN,  
22 I JUST DON'T WANT TO GO THERE, UNLESS SOMEBODY  
23 THINKS IT'S SIGNIFICANT ENOUGH TO PRESENT IT TO ME  
24 IN THE FORM OF A DECLARATION OR WHAT HAVE YOU, THEN  
25 IT -- WELL, IT MAY NOT -- I MAY DEEM IT NOT

1 RELEVANT, BUT AT LEAST I'LL CONSIDER IT.

2 BUT WHAT I'M NOT COMFORTABLE DOING IS  
3 CONSIDERING COUNSEL'S COMMENTS AT THE PODIUM ABOUT,  
4 ABOUT WHO SAID WHAT TO WHOM.

5 MR. KAMBER: I APOLOGIZE.

6 THE COURT: I'M NOT ASKING YOU TO  
7 APOLOGIZE. I'M JUST TELLING YOU I'M NOT GOING TO  
8 CONSIDER IT.

9 MR. KAMBER: ALL I WAS TRYING TO DO WAS  
10 TO TRY TO REBUT SOMETHING THAT WAS MADE ON THE  
11 RECORD THAT I DISAGREED WITH. AND I DO NOT NEED  
12 TO.

13 THE STRENGTH OF OUR ARGUMENT AS EXPRESSED  
14 BY MR. RHODES WAS THE ISSUE OF TIMELINESS AND THE  
15 FIRST PRINCIPLE OF REQUIREMENTS OF INTERVENTION AND  
16 THE REALITY THAT THE INTEREST OF THE CLASS ARE  
17 PROTECTED BY PROCEEDING WITH PRELIMINARY APPROVAL  
18 AND MR. WILSON'S OWN CLIENTS INTERESTS ARE  
19 PROTECTED BY HIM OPTING OUT OR HIM COMING BACK AT A  
20 LATER DATE AND VOICING HIS CONCERNS ON FINAL  
21 APPROVAL.

22 THE COURT: OKAY. MR. WILSON, ANY FINAL  
23 THOUGHTS ON THIS?

24 MR. WILSON: I'LL MAKE IT BRIEF, YOUR  
25 HONOR. ONE, THIS WAS THE THING THAT CAME HOME TO

1 ME AND I CONTACTED BLOCKBUSTER IMMEDIATELY AND I  
2 SENT THEM THE E-MAIL.

3 THE CONCERN WAS THAT AT THAT POINT THERE  
4 WAS NO INDICATION THAT FACEBOOK WAS TRYING TO  
5 RESOLVE THIS ON BEHALF OF BLOCKBUSTER OR THAT THERE  
6 WERE EVEN SETTLEMENT NEGOTIATIONS PENDING. I'M ON  
7 THE OUTSIDE AND LOOKING IN ON THIS.

8 AND COMING IN AND ARGUING IF THERE IS  
9 SOME SETTLEMENT, FACEBOOK IS RESOLVING IT'S CLAIMS  
10 AND IT'S GOING TO INCLUDE BLOCKBUSTER AND MY RIGHT  
11 TO PROCEED WITH THIS CASE AND THAT SORT OF THING, I  
12 MEAN, WE DIDN'T HAVE ANY INDICATION THAT WE NEEDED  
13 TO SEE WHAT WAS THE NEXT STEP, REALLY, FOR COMING  
14 INTO THIS COURT AND TRYING TO ARGUE THAT THEY'RE  
15 IMPEDING OUR RIGHTS TO PROCEED IN THIS LITIGATION.

16 AND SO I DO ACKNOWLEDGE MR. MALLEY  
17 APPARENTLY HAD THIS CONVERSATION WITH MR. --

18 THE COURT: YOU'RE AWARE OF THE CLAIMS  
19 AGAINST FACEBOOK? WOULDN'T IT SURPRISE YOU IF  
20 FACEBOOK RESOLVED THIS CASE AND LEFT ITSELF EXPOSED  
21 TO BEING BROUGHT IN ON THE THIRD PARTY BASIS BY  
22 SOMEBODY ELSE?

23 I MEAN, PUTTING ASIDE THIS QUESTION OF IF  
24 THERE'S SOME, YOU KNOW, SUBTERRANEAN AGREEMENT OR  
25 WHATEVER, YOU KNOW, MAYBE -- I HAVE BEEN A LAWYER

1 FOR A WHILE BEFORE I DID THIS JOB. YOU KNOW, IT  
2 STRIKES ME AS SORT OF THE TYPICAL CIRCUMSTANCES  
3 THAT THE PARTY WOULD WANT TO PROTECT ITSELF NOT  
4 JUST FROM THE DIRECT CLAIM BUT ANY POTENTIAL FOR  
5 BEING BROUGHT IN THROUGH THE BACK-DOOR.

6 SO THIS IDEA THAT I SHOULD ASSUME SOMEHOW  
7 THAT FACEBOOK IS DOING SOMETHING OTHER THAN  
8 PROTECTING ITS OWN INTERESTS, I GUESS I'M NOT  
9 SEEING THAT.

10 AND YOU'RE ASKING ME TO ASSUME THAT  
11 SOMETHING, SOME DEAL IS GOING ON WHEN, WHEN SIMPLY  
12 THE SURFACE OF WHAT I SEE IS A PARTY, WHETHER OR  
13 NOT IT ULTIMATELY GETS APPROVED BUT A PARTY ACTING  
14 IN A FAIRLY TYPICAL FASHION OF TRIAL TO MAKE SURE  
15 THAT THERE'S NO CLAIM THAT CAN BE BROUGHT BACK  
16 AGAINST THEM.

17 THAT'S WHAT YOU DO IN BEING A PRUDENT  
18 SETTling PARTY, ISN'T IT?

19 MR. WILSON: YOUR HONOR, I GO BACK TO THE  
20 PUBLIC POLICY ARGUMENTS THAT ARE PRESENTED BEFORE  
21 YOUR HONOR. THE JOINT TORTFEASORS ARE ACTING IN  
22 CONCERT IN REACHING AN AGREEMENT TO TAKE A COURSE  
23 OF ACTION THAT IS GOING TO VIOLATE A FEDERAL  
24 REGULATORY STATUTE, AND THEN THE RECIPIENT OF THAT  
25 INFORMATION IS GOING TO COME TO THIS COURT AND ASK

1        THAT THE CLASS BE CERTIFIED.

2                I WOULD SUBMIT THAT THE INQUIRY NEEDS TO  
3        BE MADE BY THIS COURT, AND IT NEEDS TO BE  
4        DETERMINED BY THIS COURT IF THAT INDEED IT IS GOING  
5        ON AND IF THE COURT HAS TAKEN PART IN AN INDEMNITY  
6        AGREEMENT THAT WOULD BE PART OF PUBLIC POLICY AND  
7        THAT'S ALL I'M ASKING.

8                THE COURT: WELL, YOU'RE DOING MORE THAN  
9        THAT. YOU'RE ASKING ME TO ASSUME THE EXISTENCE OF  
10       AN INDEMNITY AGREEMENT THAT IS CONTRARY TO PUBLIC  
11       POLICY FROM THE FACT THAT A SETTLING PARTY IS  
12       PROPOSING TO SETTLE ALL POTENTIAL CLAIMS THAT COULD  
13       COME BACK AND BITE IT.

14               AND THAT ASSUMPTION IS WITHOUT SOMETHING  
15       MORE. I DON'T SEE THE JUMPING OFF POINT BEING ONE  
16       THAT I HAVE ANY BASIS TO MAKE BECAUSE THIS PARTY IS  
17       NOT ACTING IN ANY WAY SIMPLY ON THE BASIC FACTS I  
18       HAVE.

19               THERE IS NO REASON FOR ME TO QUESTION WHY  
20       THEY'RE NOT SIMPLY OPERATING IN THEIR OWN  
21       SELF-INTEREST.

22               NOW, YOU MAY THEN HAVE AN ARGUMENT TO SAY  
23       THAT THE EFFECT OF THEIR SETTLEMENT AND SOME  
24       PUNITIVE CLASS MEMBER CAN COME IN AND OBJECT AND  
25       SAY, YOU KNOW, WHAT IS UNFAIR ABOUT THIS IS THE



1 EFFECT OF THIS SETTLEMENT MEANS THAT A TORTFEASOR  
2 IS GETTING OFF SCOTT FREE, AND, THEREFORE, JUDGE,  
3 YOU SHOULDN'T LET THIS SETTLEMENT BE APPROVED.

4 WELL, I MAY HEAR THAT AND I WILL CONSIDER  
5 IT AT THE TIME, BUT THE NOTION THAT THERE IS A  
6 CONTRARY TO PUBLIC POLICY SUBTERRANEAN AGREEMENT  
7 HERE FROM THE FACT THAT A SETTLING PARTY IS TRYING  
8 TO MAKE SURE THAT IT CAN'T BE SUED AGAIN FOR THE  
9 CONDUCT THAT IT THINKS IT'S SETTLING IS KIND OF AN  
10 ASSUMPTION THAT I DON'T THINK I HAVE ANY BASIS TO  
11 MAKE.

12 MR. WILSON: I WOULD POINT OUT, YOUR  
13 HONOR, THAT THE TERMS OF THE SETTLEMENT AGREEMENT  
14 DEFINE BEACON MERCHANTS AND DEFINE THAT ALL CLAIMS  
15 AGAINST BEACON MERCHANTS ARE PARTICULARLY SETTLED.  
16 SO IT'S NOT PUTTING JUST THE REST OF THE CLAIMS  
17 AGAINST FACEBOOK, IT'S PUTTING ALL OF THE --

18 THE COURT: AND IF SOMEONE SUES ONE OF  
19 THESE BEACON MERCHANTS PRESUMABLY WITHOUT ANY  
20 PROTECTION, BEACON COULD TURN AROUND AND SAY I'M  
21 SUING FACEBOOK, COULDN'T THEY? I MEAN, WELL, WE  
22 DON'T HAVE TO GET INTO THAT.

23 MR. WILSON: MAY I MAKE ONE OTHER POINT?

24 THE COURT: YES, GO AHEAD.

25 MR. WILSON: THERE SEEMS TO BE KIND OF

1 THE SUGGESTION AMONGST THE PARTIES THAT THE COURT  
2 CAN DETERMINE THE TYPICALITY AND ALL OF THESE OTHER  
3 ISSUES. YOU KIND OF HAVE TO DETERMINE JUST  
4 GENERALLY IF IT MIGHT BE WITHIN RULE 23  
5 REQUIREMENTS, AND I WOULD POINT OUT IF THE STANDARD  
6 FOR THE COURT WERE TO APPLY DOES IT MEET EACH OF  
7 THESE?

8 AND WE WOULD SUGGEST THAT THE APPROVAL  
9 WOULD MEET A FINDING THAT IT DOES MEET COMMONALITY,  
10 TYPICALITY, ADEQUACY OF REPRESENTATION.

11 THE COURT: YOU WOULD BE THE FIRST TO  
12 ARGUE I ASSUME THAT WHEN IT COMES TO THE FAIRNESS  
13 HEARING I CERTAINLY SHOULD NOT VIEW THAT AS ANY  
14 KIND OF BINDING DETERMINATION?

15 MR. WILSON: THAT'S TRUE, YOU CAN  
16 REEVALUATE IT THEN BUT AN INITIAL DETERMINATION  
17 THAT THEY ARE MET NEEDS TO BE MADE HERE.

18 SO A TYPICALITY ARGUMENT I WOULD SUBMIT  
19 THEY HAVE TO DEMONSTRATE TO THE COURT WITH  
20 SATISFACTION THAT TYPICALITY HAS BEEN MET AND A  
21 SPECIFIC FINDING BY THIS COURT AT THIS STAGE NOT  
22 THAT TYPICALITY HAS BEEN MET. AND NOT THAT --  
23 WELL, IT MAY HAVE BEEN MET AND WE'LL EVALUATE IT AT  
24 THE FAIRNESS HEARING.

25 AND ALSO FINALLY UNDER RULE 24, YOUR

1 HONOR, THE RULES SPECIFICALLY SAYS THAT IF OUR  
2 INTERESTS ARE IMPEDED AS A PRACTICAL MATTER,  
3 MR. RHODES BASICALLY SAID WE AGREE WITH YOUR HONOR  
4 AS A PRACTICAL MATTER GIVEN THE DAMAGES THERE  
5 ACCORDING TO THE STATUTE THAT, YOU KNOW --

6 THE COURT: THIS IS FOR PERMISSIVE  
7 JOINDER OR INTERVENTION?

8 MR. WILSON: THIS IS FOR ACTUALLY 24 THAT  
9 OUR INTERESTS, THEY KEEP SAYING OUR INTERESTS ARE  
10 NOT IMPACTED, OUR INTERESTS ARE NOT IMPACTED, WE  
11 CAN OPT OUT. BUT THE RULE SAYS THAT IT CAN BE  
12 IMPACTED AS A PRACTICAL MATTER.

13 AND I THINK THE COURT HAS RECOGNIZED THAT  
14 IS --

15 THE COURT: WELL, EXCEPT THERE ARE TWO  
16 THINGS THAT YOU'RE -- THAT THE REPUDIATED CLASS  
17 MEMBERS CAN DO. THEY CAN ALSO OPT OUT AND THEY CAN  
18 ALSO COME IN AND OBJECT AT THE FAIRNESS HEARING,  
19 CAN'T THEY?

20 MR. WILSON: YES, YOUR HONOR.

21 THE COURT: WELL, THEN I'M NOT SURE HOW  
22 THEIR RIGHTS ARE AFFECTED? I GRANT YOU IT MAY BE  
23 INCONVENIENT TO COME TO CALIFORNIA. I'M NOT  
24 SUGGESTING THAT IT'S AN EASY PROCESS, BUT IT IS AN  
25 AVENUE THAT IS AVAILABLE TO PUNITIVE CLASS MEMBERS

1 IF THEY WISH TO OBJECT.

2 MR. WILSON: I CAN'T DISAGREE THAT  
3 THEY'RE ALLOWED TO OBJECT, YOUR HONOR. I WOULD  
4 JUST DISAGREE THAT THAT MEANS THAT THIS  
5 CERTIFICATION DOES NOT IMPACT THEIR RIGHTS.

6 THE COURT: OKAY. ALL RIGHT. LET ME ASK  
7 A COUPLE OF QUESTIONS ABOUT THE PROPOSED  
8 PRELIMINARY APPROVAL.

9 FIRST OF ALL, LET ME PICK UP ON  
10 MR. WILSON'S POINT, AND I DON'T KNOW WHO WANTS TO  
11 ADDRESS THIS BUT DOES PRELIMINARY APPROVAL CARRY  
12 WITH IT SOME PRELIMINARY DETERMINATION ON THE  
13 SPECIFIC ISSUES, TYPICALITY, COMMONALITY AND THE  
14 OTHER RULE 23?

15 DOES IT MEAN I'M MAKING THE FINDING ON  
16 EVEN A PRELIMINARY BASIS THAT THOSE HAVE ALL BEEN  
17 MET HERE?

18 MR. RHODES: YOUR HONOR, MIKE RHODES ON  
19 BEHALF OF FACEBOOK. I WOULD SUBMIT TO YOU THAT YOU  
20 ARE MAKING A FINDING THAT ENOUGH IS IN THE RECORD  
21 TO WARRANT ALLOWING FACEBOOK TO SEND A NOTICE TO A  
22 PROPOSED CLASS AND ON THE FINAL SETTLEMENT HEARING  
23 YOU WILL THEN ADJUDICATE WHETHER THE ELEMENTS  
24 REQUIRED TO FINALIZE THE JUDGMENT HAVE THE BAR  
25 EFFECT OF A JUDGMENT ENTERED AND ALL OF THE

1 REQUIREMENTS OF RULE 23 ARE THEN AND THEREUPON MET  
2 UPON A PLENARY THAT WILL INCLUDE MANY OTHER THINGS  
3 INCLUDING OBJECTIONS FROM THE PROPOSED CLASS.

4 AND SO I WOULD LIKE TO SAY TO YOU THAT IT  
5 IS AN INDICATION THAT YOU THINK THAT THERE IS A  
6 POSSIBILITY THAT A CLASS CAN PROPERLY BE CERTIFIED  
7 AS REQUESTED BY THE PARTIES, AND THERE'S ENOUGH IN  
8 THE RECORDS TO ALLOW US TO PROCEED WITH THE  
9 SETTLEMENT.

10 IT DOES NOT ASSURE THE FINAL JUDGMENT  
11 THAT YOU WILL THEN HAVE TO ADJUDICATE INDEPENDENTLY  
12 AT THAT TIME.

13 MR. KAMBER: AND I WOULD JUST SUGGEST  
14 THAT THE NINTH CIRCUIT CASE FROM IN RE: SYNCORE  
15 LITIGATION, WHICH IS THE FINDING THAT THE  
16 SETTLEMENT IS WITHIN THE RANGE OF POSSIBLE  
17 APPROVALS.

18 THE COURT: OKAY. THE PROPOSED ORDER  
19 THAT YOU SUBMITTED TO ME HAS A LARGE NUMBER OF  
20 DATES. YOU'RE SUBMITTING THIS TO ME WITH THE  
21 SUGGESTION THAT THESE DATES ARE TO BE SELECTED BY  
22 ME WITHOUT -- DO YOU HAVE SUGGESTIONS FOR --

23 MR. RHODES: YOUR HONOR, IF YOU LOOK AT  
24 THE MOVING PAPERS, THERE'S A PROPOSED CALENDAR. WE  
25 CAN GET YOU THE CITE, BUT WE DO ARTICULATE. WE

1 LEFT THEM BLANK BECAUSE YOU MAY DISAGREE WITH  
2 THOSE.

3 MR. KAMBER: YOU'LL FIND ON THE  
4 PLAINTIFF'S BRIEF WHICH IS DOCKET NUMBER 38 ON PAGE  
5 14.

6 THE COURT: OKAY. THAT'S WHERE YOU HAVE  
7 THE PROPOSED?

8 MR. KAMBER: YES, WHICH IS PAGE 19 OF 20  
9 OF THE ECF PAGINATION. THOSE WOULD BE THE DATES  
10 THAT RANGE FROM NOVEMBER 30TH TO THE FINAL FAIRNESS  
11 HEARING OF FEBRUARY 24TH.

12 THE COURT: HOW ABOUT THE PROPOSED THIRD  
13 PARTY ADMINISTRATOR? YOU'RE GOING TO -- IS THAT IN  
14 THE PAPERS AS WELL?

15 MR. KAMBER: I'M NOT SURE. IT WAS  
16 ROSENTHAL AND COMPANY.

17 THE COURT: OKAY. ANYTHING ANYONE WOULD  
18 NOW MOVE FOR -- AND I'LL TAKE UNDER SUBMISSION THE  
19 INTERVENTION MOTION.

20 WITH RESPECT TO THE PRELIMINARY APPROVAL,  
21 ANYTHING EITHER FACEBOOK'S COUNSEL OR PLAINTIFF'S  
22 COUNSEL WANT TO SAY BEYOND WHAT YOU HAVE ALREADY  
23 PRESENTED TO ME IN THE PAPERS?

24 MR. RHODES: NO, YOUR HONOR. WE'LL  
25 SUBMIT IT.

1 MR. KAMBER: NO. UNLESS YOU HAVE ANY  
2 FURTHER QUESTIONS REGARDING ANY OF THE OTHER  
3 ISSUES, BUT WE THINK THE PAPERS SPEAK FOR  
4 THEMSELVES, YOUR HONOR.

5 THE COURT: OKAY. VERY GOOD. THANK YOU.  
6 I'LL GO BACK AND TAKE A LOOK THROUGH ALL OF THIS  
7 AND GIVE YOU AN ORDER.

8 MR. KAMBER: THANK YOU, YOUR HONOR.

9 MR. RHODES: THANK YOU, YOUR HONOR.

10 (WHEREUPON, THE PROCEEDINGS IN THIS MATTER  
11 WERE CONCLUDED.)  
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